

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 22nd day of December, two thousand nine.

PRESENT:

ROGER J. MINER,
JOSÉ A. CABRANES,
RICHARD C. WESLEY,
Circuit Judges.

FERNANDO CARDENAS RIANO, AKA FERNANDO
RIANO CARDENAS; EDDA M. RODRIGUEZ;
DIEGO F. CARDENAS,
Petitioners,

v.

ERIC H. HOLDER JR., UNITED STATES
ATTORNEY GENERAL; JANET NAPOLITANO,
SECRETARY OF THE UNITED STATES

08-5573-ag
NAC

1 **DEPARTMENT OF HOMELAND SECURITY,***
2 ***Respondents.***
3

4 **FOR PETITIONERS:** Kevin E. Dehghani, New Haven,
5 Connecticut.

6 **FOR RESPONDENTS:** Michael F. Hertz, Acting Assistant
7 Attorney General; Michael P.
8 Lindemann, Assistant Director;
9 Douglas E. Ginsburg, Senior
10 Litigation Counsel, Office of
11 Immigration Litigation, United
12 States Department of Justice,
13 Washington, D.C.

14 UPON DUE CONSIDERATION of this petition for review of a
15 Board of Immigration Appeals ("BIA") decision, it is hereby
16 ORDERED, ADJUDGED, AND DECREED that the petition for review
17 is DISMISSED in part and DENIED in part.

18 Fernando Cardenas Riano, Edda M. Rodriguez, and Diego
19 F. Cardenas, natives and citizens of Colombia, seek review
20 of an October 22, 2008 order of the BIA, affirming the
21 December 14, 2006 decision of Immigration Judge ("IJ")
22 Michael W. Straus, which pretermitted as untimely their
23 application for asylum, and denied their applications for

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Michael B. Mukasey and Secretary Janet Napolitano is substituted for former Secretary Michael Chertoff as respondents in this case.

1 withholding of removal and relief under the Convention
2 Against Torture ("CAT"). *In re Fernando Cardenas Riano,*
3 *Edda M. Rodriguez, and Diego F. Cardenas*, Nos. A098 816 493,
4 A098 814 355, A098 816 724 (B.I.A. Oct. 22, 2008), *aff'g*
5 Nos. A098 816 493, A098 814 355, A098 816 724 (Immigr. Ct.
6 Hartford, CT, Dec. 14, 2006). We assume the parties'
7 familiarity with the underlying facts and procedural history
8 in this case.

9 As an initial matter, we lack jurisdiction to review
10 the IJ's decision insofar as it pretermitted petitioners'
11 untimely asylum application, and we dismiss the petition for
12 review to that extent. See 8 U.S.C. § 1158(a)(3).

13 When the BIA does not expressly "adopt" the IJ's
14 decision, but its brief opinion closely tracks the IJ's
15 reasoning, we consider both the IJ's and the BIA's opinions
16 "for the sake of completeness." *Zaman v. Mukasey*, 514 F.3d
17 233, 237 (2d Cir. 2008). We review the agency's factual
18 findings under the substantial evidence standard. See 8
19 U.S.C. § 1252(b)(4)(B); see also *Corovic v. Mukasey*, 519
20 F.3d 90, 95 (2d Cir. 2008). We review *de novo* questions of
21 law and the application of law to undisputed fact.
22 *Salimatou Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008).

1 To establish eligibility for withholding of removal, an
2 applicant must establish that his past persecution or fear
3 of persecution is *on account of* his race, religion,
4 nationality, political opinion, or membership in a
5 particular social group. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R.
6 § 1208.16(b)(1). Riano argues that he established that the
7 harm he suffered and continues to fear bears a nexus to both
8 his political opinion and his membership in the particular
9 social group of wealthy landowners in Colombia. We decline
10 to consider Riano's unexhausted argument that he
11 demonstrated that the Revolutionary Armed Forces of Colombia
12 ("FARC") threatened him on account of his political opinion.
13 *See Lin Zhong v. Dep't of Justice*, 480 F.3d 104, 119-20 (2d
14 Cir. 2007).

15 The agency did not err in finding that Riano failed to
16 demonstrate both that "wealthy landowners" constitutes a
17 particular social group and that FARC threatened him on
18 account of his membership in the particular social group of
19 wealthy landowners in Colombia. *See* 8 C.F.R. §
20 1208.16(b)(1). Members of a particular social group must
21 "share a common, immutable characteristic," which may be
22 either innate or a product of shared past experience.

1 *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
2 “The shared characteristic might be an innate one such as
3 sex, color, or kinship ties, or in some circumstances it
4 might be a shared past experience such as former military
5 leadership or land ownership.” *Id.* The group
6 characteristic must also entail a level of “social
7 visibility” sufficient to identify members to others in the
8 community, particularly to potential persecutors. See
9 *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007)
10 (citing *Matter of C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A.
11 2006) and *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 74
12 (B.I.A. 2007)). In addition, the particular social group
13 must be defined with sufficient particularity. *Matter of A-*
14 *M-E & J-G-U-*, 24 I. & N. Dec. at 76.

15 Riano’s sole argument challenging the agency’s
16 determination that he failed to demonstrate that the threats
17 he received were on account of his membership in a
18 particular social group is his assertion that “wealthy
19 landowner” is sufficiently distinguishable from “wealthy,” a
20 characteristic that was found not to define a particular
21 social group in *Ucelo-Gomez*. In *Ucelo-Gomez*, 509 F.3d at
22 72, we found reasonable the BIA’s precedential decision in
23 *Matter of A-M-E & J-G-U-*, concluding that “wealthy

1 Guatemalans" did not constitute a particular social group
2 because "[t]he characteristic of wealth or affluence is
3 simply too subjective, inchoate, and variable to provide the
4 sole basis for membership in a particular social group."
5 *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. at 76; see also
6 *id.* at 73-74. Riano argues that his particular social group
7 of wealthy landowners in Colombia differs from the "wealthy
8 Guatemalan" social group in *Ucelo-Gomez* because it includes
9 land ownership in addition to wealth as a characteristic.
10 However, simply because Riano's defined social group differs
11 from the social group rejected in another case does not
12 automatically lead to the conclusion that he demonstrated
13 the social visibility or particularity required to satisfy
14 the particular social group requirement. See *Matter of A-M-*
15 *E & J-G-U-*, 24 I. & N. Dec. at 74 (noting that "[w]hether a
16 proposed group has a shared characteristic with the
17 requisite 'social visibility' must be considered in the
18 context of the country of concern and the persecution
19 feared"); see also *Ucelo-Gomez*, 509 F.3d at 72-74. Riano
20 does not cite any country conditions evidence in the record
21 demonstrating that FARC recognizes and targets landowners as
22 a group as opposed to targeting those with money in an

1 effort to expand their coffers.¹ Moreover, the 2005 U.S.
2 Department of State Country Report on Human Rights Practices
3 in Colombia ("2005 Country Report"), which is included in
4 the record, does not indicate that FARC specifically targets
5 individuals on account of their ownership of land.
6 Therefore, the agency reasonably found that Riano failed to
7 demonstrate that "wealthy landowners" was a sufficiently
8 cognizable group or that, even if it was, he was targeted on
9 account of his membership in that group. *See Matter of A-M-*
10 *E & J-G-U-*, 24 I. & N. Dec. at 76.

11 Accordingly, because the agency reasonably determined
12 that Riano failed to demonstrate a nexus between any harm he
13 suffered or continued to fear and a protected ground, the
14 agency reasonably denied his application for withholding of
15 removal. *See* 8 C.F.R. § 1208.16(b)(1).

16 The agency also did not err in denying Riano's
17 application for CAT relief because he failed to demonstrate

¹ In his reply brief, Riano cites extra-record evidence that he contends demonstrates that FARC targets wealthy landowners. However, because we must "decide the petition only on the administrative record on which the order of removal is based," 8 U.S.C. § 1252(b)(4)(A), we will not consider Riano's extra-record evidence. Nor will we remand to the agency for it to consider such evidence. *See Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 269 (2d Cir. 2007).

1 that FARC would likely torture him with the acquiescence of
2 the Colombian government. The agency's regulations define
3 torture, in pertinent part, "as any act by which severe pain
4 or suffering . . . [for certain purposes] is inflicted by or
5 at the instigation of or with the consent or acquiescence of
6 a public official or other person acting in an official
7 capacity." 8 C.F.R. § 1208.18(a)(1). We have held that
8 "acquiescence . . . requires only that government officials
9 know of or remain willfully blind to an act and thereafter
10 breach their legal responsibility to prevent it." *Khouzam*
11 *v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004). As the
12 government notes, the 2005 Country Report in the record
13 indicates that the Colombian government has engaged in a
14 long struggle with FARC and that conditions in Colombia have
15 improved. Moreover, Riano testified that he had not
16 reported FARC's threats to the police. See 8 C.F.R. §
17 1208.18(a)(7) ("Acquiescence of a public official requires
18 that the public official prior to the activity constituting
19 torture, have awareness of such activity and thereafter
20 breach his or her legal responsibility to intervene to
21 prevent such activity."). Nor does Riano refer to any
22 evidence in the record demonstrating that the government of
23 Colombia would likely acquiesce in FARC's threats or

1 torture. Accordingly, we find that the agency reasonably
2 denied his application for CAT relief. See *id.*

3 For the foregoing reasons, the petition for review is
4 DISMISSED in part and DENIED in part. As we have completed
5 our review, any stay of removal that the Court previously
6 granted in this petition is VACATED, and any pending motion
7 for a stay of removal in this petition is DISMISSED as moot.
8 Any pending request for oral argument in this petition is
9 DENIED in accordance with Federal Rule of Appellate
10 Procedure 34(a)(2), and Second Circuit Local Rule 34(b).

11 FOR THE COURT:
12 Catherine O'Hagan Wolfe, Clerk
13

14 By: _____